Supreme Court, U.S.
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No. 98-1905

IN THE
SUPREME COURT OF THE UNITED STATES

JESSIE TOMPKINS, *et al.*

Petitioners,

v.

ALABAMA STATE UNIVERSITY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioners submit this short response to the briefs in opposition filed by the State of Alabama ("Ala. Br.") and the Alabama State University Respondents ("ASU Br.").

1. Respondents cannot quite agree on what the Second Amended Complaint (the "Complaint") challenges. The Alabama State University Respondents (the "ASU Respondents") insist the Complaint is a "direct attack on the Knight decree." ASU Br. 4. Alabama, on the other hands, correctly recognizes that petitioners are challenging a program of all-white scholarships that goes beyond anything the District Court in Knight authorized. Ala. Br. 2. (Alabama also asserts that the Tompkins plaintiffs are "[i]gnoring the distinction" (id.) between the Knight decree and the actual program implemented by ASU. It does not explain how the Tompkins plaintiffs are doing this.)

Alabama's concession raises the natural question: if the program being challenged goes beyond what the District Court in Knight authorized, why should the Tompkins plaintiffs be forced to litigate their complaint in Knight?

2. Alabama makes the following remarkable two-pronged argument: first, that Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973) stands for the proposition that even non-parties must intervene in ongoing school desegregation cases (Ala. Br. 6); and, second, that Hines and Martin v. Wilks, 490 U.S. 755 (1989) "do not conflict" (Ala. Br. 6). These twin assertions, of course, cannot withstand even a cursory reading of Martin. See Martin, 409 U.S. at 763 ("'The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger'" quoting Chase Nat'l Bank v. Norwalk, 291

U.S. 431, 441 (1934)); id. ("the drafters cast Rule 24, governing intervention, in permissive terms").

3. Echoing the District Court, both respondents (Alabama quite explicitly) insist that Martin is inapplicable because the Tompkins plaintiffs are parties to the Knight litigation. Ala. Br. 6 ("the Tompkins Plaintiffs are not non-parties to the Knight case; to the contrary, they are members of a certified class of plaintiffs in Knight"); ASU Br. 8 ("Martin v. Wilks does not change anything here because that case was about non-parties . . . Here we are dealing with class members . . . "). Neither respondent can say anything at all about the fact, emphasized in the Petition, that this Court in Martin specifically stated that an absent class member is "not a party" (Pet. 20-21, quoting Martin, 490 U.S. at 762 & n.2) -- and one can only suppose that they mostly wish this Court had not said it. See also Ortiz v. Fibreboard Corp., 1999 WL 412604, *15 (U.S. June 23, 1999) (quoting footnote 2 from Martin for the proposition that the relevant res judicata exception exists for one who is "not a party").

4. Also echoing the lower courts, the ASU Respondents repeatedly insist that the Tompkins plaintiffs cannot be prejudiced because "their right to proceed in an independent case" would "require[] them to prove they were inadequately represented in Knight." ASU Br. 5. See also ASU Br. 7. But this, of course, is exactly wrong. In an independent litigation, defendants have the burden of proving and pleading affirmative defenses, including res judicata. See Rule 8(c), Fed. R. Civ. P.; Gomez v. Toledo, 446 U.S. 635, 640 (1980). Accordingly, in an independent action it would be defendants who would be obliged to plead and prove that plaintiffs had been adequately represented in the Knight litigation.

5. Both respondents insist that there is no circuit split because the Tenth Circuit decision in Garcia v. Bd. Of Ed., School District No. 1, 573 F.2d 676 (10th Cir. 1978) was superceded or overruled or modified -- respondents do not say which -- in Miller v. Bd. of Ed., 667 F.2d 946 (10th Cir. 1982). (Miller makes no mention of Garcia at all.) In the petition, the Tompkins plaintiffs pointed out that Miller was just another pre-Martin "impermissible collateral attack" case (Pet. 21 n.10), and respondents say nothing at all to refute this. Thus, respondents have it exactly backwards. It is not Garcia that no longer states Tenth Circuit law; if anything, it is Miller that no longer states good law.

6. Lastly, it deserves mention that the policy reasons in the ASU Respondents' long discussion attempting to justify the decision of the courts below (see ASU Br.7, 9-13) sound precisely like the reasons used by the pre-Martin cases to uphold the "impermissible collateral attack" doctrine and rejected by the Court in Martin. See Pet. 20. Thus, even if the ASU Respondents were correct that it would be "efficient" for the Tompkins plaintiffs to wade into the morass of the Knight litigation -- and it is hard to believe that it would, since the Knight litigation covers a myriad of parties and ongoing remedies throughout Alabama that simply have nothing to do with the racially-exclusive scholarships that are at issue here -- it would not matter. Martin has rejected any rule that intervention is obligatory whenever it is "efficient."

The ASU Respondents complain that both the United States and the Knight plaintiffs (their nominal opponents in the Knight litigation) "have fought for many years to gain effective relief to end . . . racial discrimination." ASU Br. 11. But the fact that the plaintiffs in

Knight apparently believed that they could "end racial discrimination" by acceding to a whites-only scholarship only underscores the necessity for an independent litigation in which the Tompkins plaintiffs can focus upon this counterintuitive conclusion of theirs.

CONCLUSION

This Court should grant the petition.

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